

A KancilTek (M) Sdn Bhd v Mayban Finance Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 25–8 OF
2000 (1)
SYED AHMAD HELMY JC
29 SEPTEMBER 2000

B

Civil Procedure — Action — Commencement — Application for production of document — Originating motion wrongly used instead of originating summons — Non compliance with O 5 r 5 Rules of the High Court 1980 — Whether application incurably defective — Defendant entered unconditional appearance, whether waiver

C

The applicant filed an originating motion for the production of the application form relating to the third party charge, drafted in the following manner: ‘responden diarahkan untuk menyampaikan kepada pemohon dalam jangkamasa lapan hari dari tarikh perintah ini dikeluarkan suatu salinan yang diperakui sah oleh pihak responden borang permohonan pinjaman ...’. The respondent raised a

D

preliminary objection that the commencement of the action by way of originating motion was wrong owing to the non-fulfillment and non-compliance of the requisites as prescribed by O 5 r 5 of the Rules of the High Court 1980 (‘the RHC’). The applicant in resising the objection contended that the court has a discretion to treat the non-compliance of O 5 r 5 of the RHC as an irregularity and in any event the respondent had waived their right to object by reason of their unconditional appearance.

E

Held, allowing the preliminary objection:

F

(1) By virtue of the express requirement of O 5 r 5, the use of originating motion under the RHC is only permissible if authorized by the RHC or any written law. Further, O 5 r 5 imposes an obligation on the applicant to fulfil the requirement of an intitlement of the statute or rule of court under which the court is moved in either the heading or the body of the application. The court found that the claim of the applicant as prayed did not and could not disclose a cause of action against the respondent and as such the originating motion could not be sustained and must be dismissed (see pp 188D, 189H–I, 191B–C).

G

H

(2) Under O 12 of the RHC, the requirement of entry of appearance is only confined to writ of summons and originating summons. The entry of unconditional appearance by the respondent could not amount to a waiver for the reason that there was no necessity or requirement under the RHC to enter an appearance against an originating motion in the first place (see p 191G, H–192A).

I

(3) As the requirements of O 5 r 5 of the RHC — relating to the express stipulation of the relevant rules of court or statute upon which the application was founded which was not complied with — was so fundamental, the court’s discretion could not be moved

in favour of the applicant. If there is no empowering provision either by statute or rules, the application and the prayers therein were incurably defective (see p 192D–E).

[Bahasa Malaysia summary]

Pemohon telah memfailkan satu usul pemula untuk pengeluaran borang permohonan berhubung dengan gadaian pihak ketiga, yang telah diderafkan menurut cara yang berikut: ‘responden diarahkan untuk menyampaikan kepada pemohon dalam jangkamasa lapan hari dari tarikh perintah ini dikeluarkan suatu salinan yang diperakui sah oleh pihak responden borang permohonan pinjaman ...’. Responden membangkitkan bantahan awal bahawa permulaan tindakan melalui usul pemula adalah salah disebabkan ketidak-patuhan syarat-syarat sepertimana yang ditetapkan oleh A 5 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 (‘KMT’). Pemohon dalam menolak bantahan tersebut menegaskan bahawa mahkamah mempunyai budi bicara untuk melayan ketidak-patuhan akan A 5 k 5 KMT sebagai suatu luar aturan dan dalam sebarang keadaan responden telah mengetepikan hak mereka untuk membantah disebabkan oleh kehadiran tanpa bersyarat mereka.

Diputuskan, membenarkan bantahan awal tersebut:

- (1) Menurut syarat nyata A 5 k 5, penggunaan usul pemula di bawah KMT hanya boleh dibenarkan jika diberi kebenaran oleh KMT atau sebarang undang-undang bertulis. Selanjutnya, A 5 k 5 mengenakan kewajiban ke atas pemohon untuk memenuhi syarat tajuk statut atau kaedah mahkamah di bawah yang mana mahkamah diusul dalam sama ada tajuk atau badan permohonan tersebut. Mahkamah mendapati bahawa tuntutan pemohon sepertimana yang dipohon tidak dan tidak boleh mendedahkan satu kausa tindakan terhadap responden and oleh yang demikian usul pemula tersebut tidak boleh dipertahankan dan haruslah ditolak (lihat ms 188D, 189H–I, 191B–C).
- (2) Di bawah A 12 KMT, syarat kemasukan kehadiran adalah hanya terhad kepada writ saman dan saman pemula. Kemasukan kehadiran tanpa bersyarat oleh responden tidak boleh membawa kepada satu pengetepian kerana tidak terdapat keperluan atau syarat di bawah KMT untuk memasuki suatu kehadiran terhadap usul pemula pada asalnya (lihat ms 191G, H–192A).
- (3) Oleh kerana syarat-syarat A 5 k 5 KMT — berhubung dengan penetapan nyata kaedah-kaedah relevan mahkamah atau statut di atas yang mana permohonan tersebut diasaskan yang telah tidak dipatuhi — adalah sungguh penting, budibicara mahkamah tidak dapat memihak kepada pemohon. Jika tidak terdapat peruntukan yang memberi kuasa sama ada melalui statut atau kaedah-kaedah, permohonan tersebut serta pohonan-pohonan di dalam

- A adalah tidak sempurna secara yang tidak boleh dipulihkan (ms 192D–E).]

Notes

- B For cases on commencement of action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 49–59.

Cases referred to

- C *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 (refd)
Cheow Chew Khoo (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)
Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the Estate of Low Ai Lian) & Ors [1999] 3 MLJ 481 (refd)
D *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448 (refd)
Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors [1995] 4 CLJ 606 (refd)

Legislation referred to

- E Banking and Financial Institutions Act 1989
Companies Act 1965
Rules of the High Court 1980 O 2, r 1(2), O 5 rr 1, 5, O 12, O 28 r 8(1), O 52 r 3, O 53 r 2, O 69 r 2, O 88 r 3,
F *YY Wu (Wu & Co)* for the applicant.
Mohd Haaziq (JS Pillay & Mohd Haaziq) for the respondent.

Syed Ahmad Helmy JC:. The question for determination in this application is whether the mode of commencement by way of originating motion by the applicant for the production of the application form relating to the third party charge is the proper mode.

- G The question arose from the preliminary objection raised by the respondent who contended that the commencement of the action by way of originating motion was wrong owing to the non-fulfillment and non-compliance of the requisites as prescribed by O 5 r 5 of the Rules of the High Court 1980 ('the RHC') which regulates the various modes of commencement of civil proceedings in the High Court.

- H The respondent's objection is based on three main grounds:

- 1 Proceedings by way of originating motion is only permissible if authorized by the RHC or any written law.
- 2 There must be explicit intitlement of the relevant statute or rules either in the heading or body of the originating process and the grounds of the application must be stated in the originating motion.
- 3 There must be a cause of action.

The applicant, in resisting the objection, contended that the court has a discretion to treat the non-compliance of O 5 r 5 of the RHC as an irregularity, and in any event, the respondent has waived their right to object by reason of their unconditional appearance filed on 29 March 2000.

I shall now address the issue by analyzing the various applicable provisions of the RHC.

Order 5 r 1 of the RHC reads as follows:

Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

Order 5 r 5 of the RHC states as follows:

Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any written law the proceedings in question are required or authorised to be so begun.

From a plain reading of the aforesaid rules it is evident that r 1 is a restatement of the four modes available and recognizable for commencement of civil proceedings in the High Court, while r 5 specifically regulates proceedings relating to originating motions and petitions in that it is only available if prescribed by the RHC or any written law.

The specific mention of the initiation of civil proceedings by way of originating motion in a specific rule to wit O 5 r 5 clearly reflects that is a species of civil proceedings which is different from writ or originating summons. The difference is further pronounced by the twin requirements of authorization by the Rules or any written law as specified therein.

His Lordship Abdul Kadir Sulaiman J (as he then was) had occasion to construe the provision of O 5 r 5 of the RHC in *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448 which was an application by way of originating motion to set aside an order for sale made under the provisions of the Sarawak Land Code and at para E at p 453 his Lordship stated:

Thus, from the said order, it is clear that originating motion is only to be used when required or authorised by the RHC or by or under any written law, which in this case is the code. Perusing the RHC and the code, I cannot find any specific rule or section which requires or authorises the plaintiff to begin this nature of proceedings as contained in this application by originating motion. In fact, the code does not at all prescribe the procedure for commencing an action of this nature.

and at para H of p 453 he concluded:

As mentioned earlier, originating motion not being the required or authorised mode, and the nature of the application is not one to be made by a petition, so what is left is the originating summons or a writ. Since the plaintiff has chosen the originating summon procedure to commence the action, I have no alternative but to agree with the submission of the learned counsel for the defendant and I accordingly allow the preliminary objection raised and hold that the plaintiff has adopted the wrong procedure to bring his grievances before the court.

- A** In the application at hand, the applicant alluded to the Banking and Financial Institutions Act 1989 ('the Act') and in particular to the secrecy provisions in Part 13 and contended that the secrecy provisions was not applicable to an application for documents made by a landowner (as in the instant case) in respect of a third party charge in favour of a customer, and by reason thereof, the respondent was not restricted to release and the applicant was entitled to apply for the documents in question.

- B** It is interesting to pause for a moment to note that though the Act was invoked through submissions made from the Bar, nevertheless the Act was never specifically alluded to or referred to in both the originating motion and the supporting affidavit of Wong Kai Wu in encl 4, and on this score alone the applicant has failed to satisfy that his application falls within the ambit of O 5 r 5.
- C**

Be that as it may, I have also carefully perused the provisions of the Act and nowhere does it provide or authorizes the applicant to commence the proceedings in the manner in which it is commenced namely by originating motion.

- D** It is also germane at this juncture that by virtue of the express requirement of O 5 r 5, the use of an originating motion under the RHC is compulsory in the following circumstances:

- (a) Under the rules
- E** (i) appeals to the High Court from any decision of any person or body of persons: O 55 r 13.
- (ii) Applications (after leave has been obtained) for an order of mandamus, prohibition, or certiorari: O 53 r 2.
- F** (iii) Proceedings for the determination of a case stated or a question of law referred by way of case under any enactment, eg from the decision of the Special Commissioners of Income Tax.
- (iv) Some applications in arbitration proceedings, eg an application for a declaration that an award made by an arbitrator is not binding on the applicant: O 69 r 2.
- G** (v) applications for an order for committal for contempt of court where there are no pending proceedings and after leave has been obtained: O 52 r 3.
- (vi) some applications under the Companies Act 1965, eg for rectification of the company register see O 88 r 3.
- H** (vii) applications under the Trade Marks Act 1976.
- (b) By or under any written law, ie where expressly required under legislation.

- I** On the second ground, namely whether the wording of O 5 r 5 of the RHC imposes an obligation on the applicant to fulfil the requirement of an intitlement of the statute or rule of court under which the court is moved in either the heading or the body of the application, I am constrained to hold in favour of the respondent.

The strictures of the requirement and the rationale behind such an obligation was aptly put by his Lordship Gopal Sri Ram JCA in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 when considering an originating summons for recovery of vacant possession which failed to specify the specific rules under which it was instituted, stated at p 477:

The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitlement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitlement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitlement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended.

The application herein in the manner in which it was drafted gives rise to the question on whether it disclosed a cause of action against the applicant herein. In *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the Estate of Low Ai Lian) & Ors* [1999] 3 MLJ 481 the Court of Appeal affirmed that an originating summons — like a pleading in a statement of claim — must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed.

His Lordship NH Chan JCA stated at paras E–I at p 487:

So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (*Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409). Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed': see *Sarasvathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiam* [1998] 1 MLJ 89 at p 96 which is a decision of this court. The words 'cause of action' have been defined by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at pp 242–243 as meaning 'simply a factual situation the

- A existence of which entitles one person to obtain from the court a remedy against another person’.

Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed. The originating summons itself does not disclose any reasonable cause of action against the company.

- B Similarly, in the case at hand, I find that the claim of the applicant as prayed, namely ‘responden diarahkan untuk menyampaikan kepada pemohon dalam jangkamasa lapan hari dari tarikh perintah ini dikeluarkan suatu salinan yang diperakui sah oleh pihak responden borang permohonan pinjaman yang telah diserahkan oleh Melati Putih Sdn Bhd (penjamin) kepada responden semasa permohonan untuk pinjaman berkala sebanyak RM1.7j (‘pinjaman tersebut’) ...’ does not and cannot disclose a cause of action against the respondent and as such the originating motion cannot be sustained and must be dismissed.

- D Even if I am wrong on the question of cause of action, nevertheless my findings in favour of the respondent on the two grounds aforesaid is sufficient affirmation of the merits of the applicant’s preliminary objection.

- E The applicant on the face of the rigorous and credible objection sought to pursue a rescue operation over its application by strenuously urging the court to exercise its discretion by treating the objection as a mere irregularity, and that the respondent by entering an unconditional appearance has waived whatever irregularity committed by the applicant.

I shall now divert my attention to the two grounds relied upon by the applicant to ascertain whether it would neutralize the respondent’s objection herein.

- F I shall proceed by addressing the question of waiver, namely whether the entry of unconditional appearance by the respondent amounts to a waiver of the non-compliance by the applicant of O 5 r 5 RHC.

- G Under the RHC, the requirement of entry of appearance is regulated by O 12 which lists out eight rules thereunder. It is interesting to note that the heading to the said O 12 is prefaced by the words ‘Entry of Appearance to Writ or Originating Summons’. The heading itself provides an uncontroverted answer as to the type of civil proceedings which requires the entry of an appearance.

- H Upon a careful analysis of all the eight rules of O 12, I find that the requirement of entry of appearance under the RHC is only confined to writ of summons and originating summons. Nowhere in the said Order or any of its eight rules are there any requirement for entry of appearances for originating motions.

- I The question thus arises — whether an entry of an unconditional appearance by the respondent herein when the provisions of entry of appearance in the RHC does not extend to originating motions can amount to a waiver on the part of the respondent. I must answer the question with an emphatic ‘no’. The entry of an unconditional appearance by the respondent here cannot amount to a waiver for the simple reason that there

is no necessity or requirement under the RHC to enter an appearance against an originating motion in the first place. Thus the entry of an appearance aforesaid cannot and does not amount to a waiver and I so hold.

Turning to the other question raised by the applicant — namely that the court should exercise its discretion and treat the objection as a mere irregularity under O 2 RHC, the applicant relied on the case of *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 CLJ 606.

Though the provisions of O 2 RHC clearly stipulates that non-compliance of the Rules is to be treated as in irregularity and not a nullity, nevertheless the said Order is not without exceptions.

It is important in applying the provisions of O 2 RHC, to have in the forefront of one's mind the trite law that if the non-compliance is so fundamental and serious, the court should not shy away from its power to set aside the proceedings — either wholly or in part as conferred by O 2 r 1(2) of the RHC. The non-compliance of the RHC, though an irregularity under this rule may not be capable of being cured if the breaches of these rules are fundamental — *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283.

In the context of the present case as the requirements of O 5 r 5 RHC relating to the express stipulation of the relevant rules of court or statute upon which the application is founded was not complied is so fundamental the court's discretion cannot be moved in the applicant's favour and I accordingly decline to accede to the applicant's request. As was submitted by the respondent's counsel and for which I agree that the bottom line is — if there is no empowering provision either by statute or rules, the application and by extension the prayers therein, is incurably defective. The upshot of it all is to uphold the preliminary objection of the respondent herein.

Before concluding, I would like to state that *Pen Apparell's* case cited by applicant's counsel clearly emphasizes and reaffirms the approach to be taken by the court, namely even if the RHC confers discretionary powers of conversion to the court (like converting an originating summons' action to a writ action pursuant to O 28 r 8(1) RHC) nevertheless if the court declines to exercise its discretion, it should not be constrained from exercising its coercive powers of striking out.

In the circumstances, for the reasons stated above, I hereby uphold the preliminary objection of the respondent and accordingly strike out the applicant's application in encl 2 with costs.

Preliminary objection allowed.

Reported by Jafisah Jaafar